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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KEIJONA MICHAEL JACKSON, Defendant and Appellant.	A154670 (Sonoma County Super. Ct. No. FCR320600)

In 2017, defendant Keijona Michael Jackson pleaded no contest to two counts of possessing methamphetamine for sale and was sentenced to a split sentence consisting of two years in county jail and four years of mandatory supervision, which sentence included a three-year enhancement based on a previous conviction for methamphetamine possession for sale. In October, the Governor signed legislation eliminating the three-year enhancement for Jackson's previous conviction with an effective date of January 1, 2018. Jackson moved to strike the enhancement, arguing that he was entitled to the retroactive benefit of the new legislation, and the trial court denied the motion and reinstated Jackson's mandatory supervision. We affirm.

BACKGROUND

On January 12, 2017, Jackson pleaded no contest to two counts of possession of methamphetamine for sale in violation of Health and Safety Code section 11378. As part of his plea, Jackson admitted that he had a previous conviction for violating section 11378, within the meaning of Health and Safety Code section 11370.2, subdivision (c), and had served one prior prison term within the meaning of Penal Code section 667.5,

subdivision (b). Pursuant to a negotiated disposition, the parties agreed that Jackson would serve a six-year split sentence (Pen. Code, § 1170, subd. (h)(5)) consisting of a two-year county jail term followed by a four-year term of mandatory supervision.

At sentencing on February 9, the trial court imposed the stipulated sentence, calculated as follows: the middle term of two years on each count, to run concurrently; a consecutive three-year term for the prior narcotics conviction enhancement (Health & Saf. Code, § 11370.2, subd. (c)); and a consecutive one-year term for the prior prison term enhancement (Pen. Code, § 667.5, subd. (b)). Execution of the concluding four years of the sentence was stayed and deemed a period of mandatory supervision pursuant to Penal Code, section 1170, subdivision (h)(5). Jackson did not appeal.

On July 25, 2017, the probation department submitted a memo to the court indicating that Jackson had violated the terms of his mandatory supervision. On September 29, after a contested revocation hearing, the court found the violation allegations to be true. On October 27, the trial court reinstated and modified the terms of Jackson's mandatory supervision.

On January 1, 2018, Senate Bill No. 180 became effective, which amended Health and Safety Code section 11370.2, subdivision (c), to remove Health and Safety Code section 11378 from the list of previous convictions that qualify a defendant for a three-year enhancement under that section. (See Health & Saf. Code, § 11370.2, subd. (c); see also Stats. 2017, ch. 677, § 1 (S.B. 180), eff. Jan. 1, 2018.)

On April 2, the probation department again petitioned to revoke Jackson's probation, on the grounds that he had failed to comply with the modified terms of his mandatory supervision. On April 13, after a contested revocation hearing, the court found the violation allegations to be true.

On May 24, Jackson moved to strike the prior conviction enhancement, arguing that Senate Bill No. 180 eliminated the basis for the enhancement. On June 7, after a hearing, the trial court denied the motion and reinstated Jackson's mandatory supervision. Jackson appeals.

DISCUSSION

Jackson's only argument on appeal is that he is entitled to the retroactive benefit of Senate Bill No. 180, and thus that the enhancement must be stricken. We review the retroactive application of a statute de novo. (*In re Marriage of Fellows* (2006) 39 Cal.4th 179, 183.)

Generally, "where [an] amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed" if the amended statute takes effect before the judgment of conviction becomes final.[1] (*In re Estrada* (1965) 63 Cal.2d 740, 744–748 (*Estrada*).) The Attorney General argues that Jackson's judgment was already final for retroactivity purposes on Senate Bill No. 180's effective date of January 1, 2018.[2]

Typically, "[a] judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired. (*People v. Kemp* (1974) 10 Cal.3d 611, 614.)" (*People v. Smith* (2015) 234 Cal.App.4th 1460, 1465.)

As the Fifth District recently explained in *People v. McKenzie* (2018) 25 Cal.App.5th 1207 (*McKenzie*), review granted November 20, 2018, S251333:

"In a criminal case, the *sentence* is the judgment. (*People v. Wilcox* (2013) 217 Cal.App.4th 618, 625 [' "A 'sentence' is the judgment in a criminal action [citations]; it is the declaration to the defendant of his disposition or punishment once his criminal guilt has been ascertained." '].) When probation is granted, however, the timing of the judgment can vary because a trial court may grant probation by either suspending *imposition* of the sentence, or by imposing the sentence and suspending its *execution*. (*People v. Segura* (2008) 44 Cal.4th 921, 932.) These two situations affect when the

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[1] The Attorney General does not address whether Senate Bill No. 180 has retroactive effect on judgments not yet final as of January 1, 2018, but appears to have conceded that it does in at least one other case. (See *People v. Millan* (2018) 20 Cal.App.5th 450, 454.)

[2] Because we agree, we need not reach the Attorney General's additional argument that Jackson's appeal is a challenge to the validity of his plea and should therefore be dismissed for failure to obtain a certificate of probable cause.

judgment becomes final, which in turn affects whether a defendant is eligible to seek the retroactive benefit of a change in law.

"In the first situation, when the trial court initially suspends *imposition* of sentence and grants probation, 'no judgment is then pending against the probationer, who is subject only to the terms and conditions of the probation.' (*People v. Howard* (1997) 16 Cal.4th 1081, 1087 (*Howard*).) No judgment has been rendered against him, or ever will be if he successfully completes probation. But if he fails to successfully complete probation and instead violates probation, the trial court may revoke and terminate probation, and then impose sentence in its discretion, thereby rendering judgment. (Pen. Code, § 1203.2, subd. (c); *Howard*, *supra*, at p. 1087.)" (*McKenzie, supra,* 25 Cal.App.5th at p. 1214.) "The probation order is considered to be a final judgment only for the 'limited purpose of taking an appeal therefrom.' " (*Howard*, at p. 1087, quoting *People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 796; Pen. Code, § 1237, subd. (a) [an "order granting probation" shall be deemed to be a final judgment for purposes of appeal].)

"In the second situation, when the trial court initially imposes sentence, but suspends *execution* of that sentence and grants probation, a judgment has been rendered. (*People v. Mora* (2013) 214 Cal.App.4th 1477, 1482 [imposition of a sentence is equated with entry of a final judgment, even if its execution is suspended and the defendant is placed on probation].) That judgment will become final if the defendant does not appeal within 60 days. (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1420-1421; see [Cal. Rules of Court,] rule 8.308(a).) If the defendant violates probation, the trial court may revoke and terminate probation, but it must then order execution of the originally imposed sentence; the trial court has no jurisdiction to do anything other than order the exact sentence into execution. (Pen. Code, § 1203.2, subd. (c); *Howard*, *supra*, 16 Cal.4th at pp. 1087-1088; *People v. Martinez* (2015) 240 Cal.App.4th 1006, 1017.)" (*McKenzie, supra,* 25 Cal.App.5th at p. 1214.)

This case is closer to the second situation. Jackson was sentenced to a four-year term of mandatory supervision pursuant to Penal Code section 1170, subdivision (h)(5),

which provides that a court "shall suspend execution of a concluding portion of the term for a period selected at the court's discretion." (Pen. Code, § 1170, subd. (h)(5)(A).) And the abstract of judgment indicates that no part of Jackson's sentence was stayed, instead, "[e]xecution of a portion [4 years] of the defendant's sentence is suspended and deemed a period of mandatory supervision under Penal Code section 1170(h)(5)(B)." Accordingly, a judgment was rendered when Jackson was sentenced on February 9, 2017, and that judgment became final 60 days later, before Senate Bill No. 180 became effective on January 1, 2018. (See *People v. Barboza* (2018) 21 Cal.App.5th 1315, 1318–1319 [judgment final for retroactivity purposes where defendant sentenced to split sentence including mandatory supervision].)

Jackson concedes that the judgment was final for purposes of appeal 60 days after February 9, but argues that finality for purposes of appeal is "not always the determinative factor in assessing finality when it comes to *Estrada* retroactivity," relying on *McKenzie*, *People v. Eagle* (2016) 246 Cal.App.4th 275, and *In re May* (1976) 62 Cal.App.3d 165. These cases do not assist Jackson, because each involved a situation in which imposition of sentence was suspended and probation granted, such that the judgment was final "only for the 'limited purpose of taking an appeal therefrom.' " (*Howard*, *supra*, 16 Cal.4th at p. 1087.) In *Eagle*, the trial court suspended imposition of sentence and placed defendant on probation, the People conceded that therefore the judgment was not final for retroactivity purposes, and the court agreed. (*Eagle*, at pp. 278–279.) In *In re May*, the proceedings were "suspended," probation was granted, and "no final judgment was entered for the purposes of this case." (*In re May*, at pp. 168–169; see also *People v. Superior Court (Rodas)* (2017) 10 Cal.App.5th 1316, 1324–1326 [questioning *In re May*'s conclusion that the judgment in that case was not yet final for retroactivity purposes].) And likewise in *McKenzie*, the court concluded that the judgment was not final for retroactivity purposes where the trial court had suspended imposition of sentence and granted probation. (*McKenzie*, *supra*, 25 Cal.App.5th at pp. 1217-1218.) The *McKenzie* court went on to observe that "[h]ad the trial court

initially imposed sentence . . . and suspended its execution, we would agree that defendant's judgment would have become final 60 days later and he could not now obtain the retroactive benefit of a change in law under *Estrada*." (*Ibid*.) That is exactly the situation here.

Jackson's reliance on *People v. Camp* (2015) 233 Cal.App.4th 461 is also misplaced. There, the defendant was sentenced under Penal Code section 1170, subdivision (h) to 14 months in county jail to be followed by 14 months of mandatory supervision. (*Camp*, at p. 465.) After the probation officer filed a report indicating that the defendant was in the country illegally, the trial court terminated his mandatory supervision and modified his sentence to time served. (*Id*. at p. 466.) The People appealed, arguing that the court acted in excess of its jurisdiction by terminating mandatory probation and modifying the defendant's sentence. (*Id*. at pp. 465–466.) The *Camp* court held that Penal Code section 1170, subdivision (h)(5)(B) expressly authorizes a trial court to terminate a defendant's mandatory supervision prior to the conclusion of the period of supervision initially ordered, and that that statutory language trumps the common law rule that the court loses resentencing jurisdiction once execution of sentence has begun. (*Camp*, at pp. 470–474.) *Camp* did not address or discuss the finality of the judgment for purposes of appeal or for retroactivity under *Estrada*. Jackson has cited no authority for the proposition that *Camp*, or more broadly whether and to what extent the trial court had the power to modify or terminate his sentence, has anything to do with the finality of the judgment for retroactivity purposes.

Our conclusion is supported by a recent decision of Division One of this court, *People v. Grzymski* (2018) 28 Cal.App.5th 799 (*Grzymski*). There, the defendant pleaded guilty to possession of heroin for sale and the trial court imposed a split sentence of 10 years, a portion of which was to be served in county jail and the balance on mandatory supervision. (*Id*. at p. 802.) Grzymski violated the terms of his mandatory supervision and pled guilty in a second prosecution to transportation of methamphetamine, and was again sentenced to a 10-year split sentence to run concurrently to his original sentence. (*Ibid*.) In a third prosecution in November 2017, the trial court terminated mandatory

supervision and ordered Grzymski to serve the balance of the 10-year term in prison. (*Ibid*.) Meanwhile, as noted above, Senate Bill No. 180 went into effect on January 1, 2018, and Grzymski argued he was entitled to the retroactive benefit of that legislation because his 2013 and 2015 split sentences were not final within the meaning of *Estrada*. (*Id*. at pp. 802–803.) Relying on *McKenzie*, the *Grzymski* court rejected this argument, holding squarely that "an unappealed order of probation suspending execution of the sentence becomes final for *Estrada* purposes within 60 days of being imposed." (*Id*. at p. 806.)

In a supplemental brief, Jackson calls our attention to *Grzymski*, and asserts that it was wrongly decided. He relies on dictum from the Supreme Court's recent decision in *People v. Chavez* (2018) 4 Cal.5th 771 (*Chavez*), which considered whether the trial court retains jurisdiction to dismiss a criminal action under Penal Code section 1385 after a sentence of probation has been completed.[3] (*Chavez*, at pp. 779–781.) After Chavez pleaded guilty, the trial court suspended imposition of sentence and placed him on probation for four years. (*Id*. at p. 777.) Years after successfully completing probation, Chavez sought to have the action dismissed in order to avoid certain immigration consequences of his conviction. (*Id*. at pp. 777–778.) The Supreme Court held that the trial court had no power to dismiss the action under section 1385 once probation was complete. (*Id*. at pp. 783–784.) Jackson relies on the following discussion from *Chavez*:

"Given that a grant of probation is not a final judgment, *when*—if ever, for purposes of section 1385—does a judgment become final for a defendant who is granted and completes probation?

"The answer lies in the probation statutes and our cases interpreting them. Section 1203, subdivision (a) defines 'probation' as 'the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervision of a probation officer.' Going as far back as *Stephens*

[3] Penal code section 1385 provides, in pertinent part, that "[t]he judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed."

v. Toomey (1959) 51 Cal.2d 864, we have explained that neither forms of probation—suspension of the imposition of sentence or suspension of the execution of sentence—results in a final judgment. In a case where a court suspends imposition of sentence, it pronounces no judgment at all, and a defendant is placed on probation with 'no judgment pending against [him].' (*Id*. at pp. 871–872.) In the case where the court suspends execution of sentence, the sentence constitutes 'a judgment provisional or conditional in nature.' (*Id*. at pp. 870–871.) The finality of the sentence 'depends on the outcome of the probationary proceeding' and 'is not a final judgment' at the imposition of sentence and order to probation. (*Id*. at p. 871.) Instead of a final judgment, the grant of probation opens the door to two separate phases for the probationer: the period of probation and the time thereafter." (*Chavez, supra,* 4 Cal.5th at pp. 781–782.)

Jackson relies on the *Chavez* court's statement that where the trial court suspends execution of sentence, the judgment is "provisional or conditional" and "not a final judgment." But this language is purely dictum. In *Chavez*, imposition of the defendant's sentence was suspended, and a split sentence was not at issue. (*Chavez, supra,* 4 Cal.5th at p. 777.) The *Chavez* court did not consider the finality of the judgment for purposes of retroactivity, nor did it make any mention of *Estrada*. Furthermore, the *Chavez* court expressly acknowledged that finality can have different meanings in different factual contexts. (*Id*. at pp. 785–786.) In short, *Chavez* does not convince us that *Grzymski* was wrongly decided. Accordingly, Jackson's judgment was final for purposes of the retroactive effect of Senate Bill No. 180, 60 days after February 9, 2017, and he is not entitled to the retroactive benefit of that legislation.

DISPOSITION

The order is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

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Stewart, J.

People v. Jackson (A154670)